

INDONESIAN PUBLIC PROCUREMENT SYSTEM RECONSTRUCTION BASED ON THE JUSTICE VALUE

HAMLY IQBAL, MAHMUTAROM HARUN AL RASYID & JAWADE HAFIDZ

Department of Jurisprudence, Universitas Islam Sultan Agung, Semarang, Central Java Indonesia

ABSTRACT

The purpose of this study is to find out the implementation of employment contracts in the procurement of Indonesian government goods/services based on the Presidential Regulation Number 54 of 2010 jo. Perpres No. 4 of 2015, analyzes the problems that arise in the implementation of employment contracts in the procurement of services/services and reconstructs the implementation of employment contracts in the procurement of ideal government goods/services based on future values of justice. The method used in this study is a descriptive analysis with a qualitative type phenomenological approach. The results of the study that one of the State's goal listed in the opening of the 1945 Constitution is to prosper the nation's life. To realize this, the government must pay attention to public services. Therefore, the government seeks to provide maximum service in fulfilling the procurement of goods / services through work contracts. in overcoming this, supervision is needed to minimize things that are not desirable, so that the objectives of the rule of law can be achieved, namely the welfare of the nation's life in a legal system in the form of contract law and the operation of the law. Then a comprehensive, integrated reconstruction is needed based on social justice for all the people of Indonesia.

KEYWORDS: Indonesian Law, Public Procurement, System Reconstruction & Justice Value

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INTRODUCTION

The philosophy of goods/services procurement is an effort to obtain goods/services desired and carried out on the basis of logical and systematic thinking (the system of thought), following the norms and ethics that are applicable, based on standard procurement's methods and processes. (Adrian Sutedi, 2008: 3).

Public goods procurement has a direct relationship with the public services where the provision of goods and services by public institutions do to fulfill public services as its responsibility to citizens e.g. (Rohidin Suharno, 2008: 19; Jones, D. S, 2007; Vaidya, K., Sajeev, A. S. M., & Callender, G, 2006)

Innovative businesses unite capital and new ideas, which requires overcoming the double trust dilemma: investors fear losing their wealth and innovators fear losing their ideas. To overcome this dilemma, seventeenth-century spice traders invented the joint stock company with an essential feature of modern corporations: entitlements to marketable shares of future profits. (Cooter, R., & Schäfer, H. B, 2011). Using the corporate form, innovative business ventures can often be organized so that innovators expect to earn more from their share of profits than from stealing the investors' money, and investors expect to earn more by preserving the company's secrets than by disseminating them. The corporation thus provides a protected space for holding creative secrets while developing them. By developing the innovations that transform economies, the corporation became the

dominant economic form of business organization. (Carayannis *et al*, 2005; Cooter, R., & Schäfer, H. B, 2011)

Procurement of goods and services in the government requires repairs to support their performance and operations. This is because the procurement of goods and services in government agencies is very complicated and must be carried out as carefully as possible because it relates to the use of the APBN / APBD (State Budget/ Regional Revenue and Expenditure Budget) (Vaidya, et all (2006). In addition, the procurement process must be in accordance with the stages stipulated in the law regarding the procurement of government goods and services, namely the Presidential Regulation (Perpres) Number 4 of 2015 concerning Procurement of Government Goods and Services. The slightest mistake is done, then the procurement committee can be entangled law (Peraturan Presiden No 4, 2015).

Procurement rules assist in the creation of competitive markets and benchmarks and reform efforts in this area would improve quality and lead to greater competitiveness among suppliers (Raymond, J, 2008).

LITERATURE REVIEW

Methodology

The social science paradigm as a systematic analysis of socially meaningful actions through direct and detailed observation of the social actors concerned creating and maintaining / managing their social world (McCrudden, C, 2004;Dedy, 2003: 3). The construction of the theory to be built by the author is a system of procurement of government goods and services based on the Presidential Regulation Number 54 of 2010 Jo. Presidential Regulation No. 4 of 2015 which is based on the value of justice. This research is based on normative law (legislation), does not examine the norm system in the rules of law, but observes the reactions and interactions that occur when the norm system works in society (Mukti et all, 210: 47; Peraturan Presiden No. 4, 2015: Peraruran Presiden No. 54, 2010).

Moleong describes eleven characteristics of a qualitative approach, namely using a natural setting, using humans as the main instrument, using qualitative methods (observation, interview, or document study) to capture data, analyze data inductively, compile grounded theory, Descriptive data analysis, more important processes than results, limiting research problems based on focus, using separate criteria (such as triangulation, peer checking, detailed descriptions, etc.) to validate data, using temporary designs (which can be adjusted to reality in the field), and research results are negotiated and agreed upon by humans as data sources. (Moleong, 2004: 10-13).

Research Subjects and Data

The research subjects are officials in state institutions related to the procurement of goods / government and service providers.

RESULTS AND DISCUSSIONS

Results

The results of the study that one of the State's goal listed in the opening of the 1945 Constitution is to prosper the nation's life. To realize this, the government must pay attention to public services. Therefore, the government seeks to provide maximum service in fulfilling the procurement of goods / services through work contracts. in overcoming this, supervision is needed to minimize things that are not desirable, so that the objectives of the rule of law can be achieved, namely the welfare of the nation's life in a legal system in the form of contract law and the operation of the law. Then a comprehensive, integrated reconstruction is needed based on social justice for all the people of Indonesia.

DISCUSSIONS

Understanding of Reconstruction of Goods / Services Procurement System

Reconstruction in KBBI (Indonesian Dictionary): (1) returns. Devices that are regularly interrelated so as to form a totality, (2) drafting. Regular arrangement of views, theories, principles, and so on (Tim Penyusun KBBI, 2008). Whereas in the dictionary Cambridge meaning of reconstruction is: (1) the process of building or creating something again that has been damaged or destroyed; (2) an attempt to get a complete description of an event using the information available, or an attempt to repeat what happened during the event (Ibid, Tim Penyusun, K. B. B. I, 2008).

Procurement of goods and services is a government acting as a public servant who handles the procurement of goods and services to fulfill the needs of the community. There are 2 (two) considerations as to why the procurement of goods and services must be done through tenders, namely (Paul Sinlaeloe, 2017)

Reconstruction of Goods / Services Procurement System Dan Goods and Services

Procurement Activities Stages

The stages in the procurement of goods and services can be grouped into 4 (four) stages, namely (Amiruddin, 2010: 46-47)

- Preparation stage;
- The Procurement Process Stage;
- Contract preparation phase;
- Contract implementation phase.

Goods / Services Procurement Contracts and Requirements for Using Price Adjustment Formula

Price adjustments are made with the following conditions: Price adjustments are applied to multi-year contracts in the form of unit price contracts based on the terms and conditions listed in the procurement documents and / or changes to procurement documents; The procedure for calculating price adjustments must be clearly stated in procurement documents; Price adjustments are not applied to single year contracts and lump sum contracts and work with unequal unit prices.

The requirements for using the price adjustment formula are as follows: Price adjustments are applied to multi-year contracts whose implementation period is more than 12 (twelve) months and are effective starting from the 13th (thirteenth) month after the execution of the work; Unit price adjustments apply to all activities / items of payment, except the profit and over-head costs as stated in the offer; Adjustment of unit prices is applied in accordance with the implementation schedule stated in the initial contract / contract addendum. Adjustment of unit prices for work components originating from abroad, uses price adjustment index from the country of origin of the goods. The type of new job with a new unit price as a result of a contract addendum can be given price adjustments starting from the 13th (thirteenth) month since the addendum to the contract is signed; and Contracts that are late in implementation are caused by an error in the supplier of goods / services. Price adjustments are based on the lowest price index between the initial schedule and the work realization schedule.

Justice to Create Efficiency and Effectiveness in the System of Procurement of Goods / Services

This can mean, if there is a clash between written legal norms and justice, then justice as the spirit of the written law must be maintained and the rules of written law which are actually only a means to realize justice can be replaced or abandoned (Mahmutarom HR, 2010: 33). It is feared that if this continues, there will be no efficiency and effectiveness in the government procurement of goods / services, and it is feared there will be irregularities in the procurement of government goods / services, and one form of deviation in the procurement of government goods / services is corruption. (Jawade Hafidz Arsyad, 2015: 5).

Based on the results of a review of the policies and implementation of procurement of goods and services for several periods by Adrian Sutedi, problems were found in the procurement of goods and services as follows (Adrian Sutedi, op.cit: 6-8).

Inefficiency

Inefficiency is becoming increasingly large when the auction process is also dishonest. This behavior creates the value of work from the goods and services to be inflated, which in turn is usually followed by dishonest procurement and there are elements of KKN.

Weak National Competitiveness

Limited opportunities for the national business community to take advantage of business opportunities in public spending in the long run have helped create a business world that has no competitiveness.

Protective Approach

The approach to procuring government goods and services tends to be protective and prioritizes aspects of business opportunity equity. This approach is indicated by the many restrictions in the participation of the business community in procurement such as the classification of providers of goods and services (large, medium and small), restrictions on operating areas based on business groups, rigid services, and so on.

Government procurement is one area where corruption is rampant in both developing and developed countries. The recipients of clandestine payments may not only be the officials who are responsible for decision making but also ministers and political parties. Transparency requires governments to adhere to higher standards of conduct by ensuring that conduct will be open to scrutiny (Raymond, J : 2008).

Law Theory

Grand Theory (Law State Theory and Welfare State)

In the Indonesian Encyclopedia, the term "legal state" (*rechtstaat*) which is opposed to the state of power (*machtstaat*) was formulated (Encyclopedia of Indonesia (N-Z), 2002: 983-984): The rule of law (*rechtstaat*) is that the state aims to carry out law and order, namely the general rule of law based on the people. Meanwhile, D. Mutiaras provides the definition of the rule of law as follows (D. Mutiaras, 1999 20):

Every act of the ruler and his people must be based on the law and at the same time include the purpose of the rule of law, namely guaranteeing the basic rights of the people. R. Soepomo defines the rule of law as: "A state of law that guarantees the existence of legal order in society means giving legal protection to society, where there is a reciprocal

relationship between law and power" (R. Soepomo, 1966: 150). While Joeniarto formulated the following (Joeniarto, 1968: 53):

Gustav Radbruch in his book *Philosophy of Legal Outline* said: "Law is a human creation, and as every creature creature is only understood by its ideals, therefore the state of law is a human creation, so that it can only be understood with its ideals (Juniarso Ridwan and Amad Sodik Sudrajat, 2009: 25).

Each community knows the structure, order, and order. These devices are fixed channels which are basically passed or should be passed in the progress and development of a society. Thus, it is the duty of the citizens of the community, both for each and together to organize order, peace, prosperity of themselves and the community (Mukhtie Fajar, 2004: 26).

Ideally, there is no country that is formed to cause difficulties and chaos for its people. Theoretically, the good goals of the country are all centered on creating the welfare of the people, and that welfare is the highest law for the state and state authorities, "Solus populi suprema lex" (Iswara, 1967: 158).

In this case, J. Barent in his book *Der Wetenschap der Politiek* argues that the real purpose of the state is maintenance, namely the maintenance of order, security, and the implementation of public welfare in its broadest sense (Barent J. De Wetenschap Der Politiek, 1965: 51).

In the phrase Vivian Bose, law is a treasure of all humanity (*the rule of law is the heritage of all mankind*) presented at the *International Congress of Legal Experts in Rio de Jenairo, Brazil, in 1962* (Ibid) (Abbott, K. W., Keohane, R. O., Moravcsik, A., Slaughter, A. M., & Snidal, D., 2000)..

Basically the welfare state refers to the role of the state which actively manages and organizes the economy, which includes the responsibility of the state to ensure the availability of basic welfare services at a certain level for its citizens. In general, a country can be classified as a welfare state if it has 4 (four) main pillars, namely (Ibid: 53-54)

- *Social citizenship;*
- *Full democracy;*
- *Modern industrial relation system;* dan
- *Right to education and the expansion of modern mass education system.*

According to Tahir Azhary, the principle of welfare aims to realize social and economic justice for the community. This social justice includes fulfilling material (material) needs and spiritual needs for all people. This task is borne by state administrators and the community and to make it happen they are demanded for upholding other principles as prerequisites such as the principles of justice, equality, free justice, and protection of human rights Muhammad Tahir Azhary, 1992: 107).

The implementation of the principle of well-being is directed at achieving what is called Mustafa As-Siba'i as a system of Islamic societies with special characteristics. As-Siba'i mentioned several characteristics of the Islamic community system, namely (Mustafa as-Siba'i, 1987: 181-182)

- The Islamic community system does not mean the zahid community (avoiding the world) and darwis (Sufi nomads) who choose to live in poverty according to Sufi ideology. The Islamic community system is a life system that is empowered to advance, move and be active in building a modern society;
- The Islamic community system, with its recognition of five human rights and legislation for social security, has the power to eradicate poverty, ignorance, and feelings of inferiority;
- The Islamic community system is suitable for Muslims and non-Muslims, because the basis and rights in this system are evenly distributed to all residents without exception;
- The Islamic community system involves the people together with the government in implementing social security;
- The Islamic community system is easily shaped, not rigid, and can be practiced at any time in accordance with the development and progress of the times.

In Islamic teachings there are norms and values that lead to the realization of prosperity for the community such as the prohibition of accumulating wealth in a certain group of people, the suggestion to be a philanthropist, the arrangement of zakat, infaq and sadaqah (Ridwan HR, 2007: 63).

Middle Theory

The legal system is a collection of elements that are in action with each other which is an organized unit and cooperation towards the goal of unity. The legal system is continuous, continuous and autonomous. The function of the legal system is to maintain or maintain a balance of order in society (retitutio in inte-grum) (Anis Mashdurohatun, 2016: 106-107).

According to Lawrence M. Friedman, a legal system (and law enforcement system) can be divided into 3 (three) parts or components, namely: structural components of law, components of legal substance, and components of legal culture. Lawrence M. Friedman describes the legal system in the following sentences (Edi Setiadi and Kristian, 2017: 167): *In modern American society, the legal system is everywhere with us and around us. To be sure, most of us do not have much contact with courts and lawyers except in emergencies. But not a day goes by and hardly a waking hour, without contact with the law in its broader sense - or with people whose behaviour is modified or influence by law. Law is vast, though sometimes invisible, pre-sence.* Components or elements contained in the legal system according to Lawrence M. Friedman are (Ibid: 167-169)

Structure (Institutional Order and Performance of Institutions)

This is the structure of the legal system - this is a durable framework or arrangement, which gives a form and definition of the whole.

Substance (Statutory Provisions)

Another aspect of the legal system is the substance. This means the actual rules, norms and patterns of behaviour of the people in the system. This is, first, "law" in the general sense the fact that the limit of exclusion is 55 miles per hour, thieves can be sent to prison, and "by law" pickle makers write material on the jar label.

Legal Culture

Another aspect of the legal system is the legal culture.

The actual reason is that law enforcement (actual enforcement) will be far from ideal law enforcement (total reinforcement and full endorsement) (Jonlar Purba, 2017: 88).

The process of law enforcement using Friedman's scheme covers all legal sub-systems, namely legal substance, legal structure, and legal culture, in which there are problems as follows (Theodorus Yosep Parera, 2016: 15-18)

Legal Substance is the Same as Legal Factor

Basically, a law or law can be considered good from enforceability if it fulfills the following conditions (Soerjono Soekanto (Ed.), 1984: 12)

- Applicable in a juridical manner, meaning that the law must be made and issued by government officials or institutions that are authorized according to legal procedures. So, the law must be formalized and promulgated based on a regulation or procedure that has been determined;
- Applicable sociologically, meaning that the law can be effectively recognized, obeyed or obeyed in society as part of daily life. The validity of the law in the community can be forced and over (by the authorities) or accepted sincerely by the citizens of the community; and
- Applies philosophically, meaning that the law that applies in the community has been obeyed in accordance with the intention of the law maker. The validity of the law philosophically is largely determined by the enactment of the law sociologically. Thus, the enactment of the law sociologically is an absolute requirement so that the law can apply philosophically.

Legal Structure Includes Legal Institutions, Legal Structures / Organizations, Law Enforcement Officers, as Well as Legal Facilities and Infrastructure; While

According to Van Doorn, there are several factors that contribute to the work of a legal officer as a human being, namely personality factors, social origins, economic interests, political beliefs, and life views.

Legal Culture includes Cultural Systems, Value Systems, Legal Knowledge, Legal Awareness, both from the Public and Law Enforcement Officers

Jan S. Maringka mentioned the problems related to the composition of the legal system, among others concerning (Jan S. Maringka, 2017: 5-6).

- Concerning the issue of legal substance, where in practice between *das Sollen* and *das Sein* often do not work. There is often ambiguity and duplication in the legal substance in the form of product legislation, where the formula of the article often creates multiple interpretations. The logical consequences of these different interpretations will give rise to uncertainty or hesitation in applying them so that they have implications for legal certainty;
- The second element is the legal structure, involving institutions. Issues that often come to the surface are related to human resources (HR) or brainware, because it is seen that so far the professionalism of law enforcement officers has not met the expectations of justice seekers.

- The final element, namely legal culture, which is related to the legal behaviour of society. The symptom of the degradation of legal culture in the community environment is marked by an increase in apathy as the level of public appreciation decreases both to the legal substance and the legal structure.

Applied Theory (Contract Law / Agreement Theory and the Working)

Contract law is part of private law. This law focuses on the obligation to carry out its own obligations (self imposed obligation). Viewed as a private law because of violations of the obligations specified in the contract, it is purely the business of the contracting parties. Contracts in the most classic form, are seen as expressions of human freedom to choose and make promises. The new paradigm of contract law arises from 2 (two) of the following propositions (Ridwan Khairandi, 2003: 81)

- Any contractual agreements held are gear-loved; and
- Every contractual agreement held freely is fair and requires legal sanctions.

Contracts in Indonesian are often referred to as "contracts". However, what in Indonesian is called an agreement, in English is not always commensurate with the contract. The contract term is used in a national or international legal framework that is civil. In the framework of public international law, which is called "agreement", in English it is often called a treaty or sometimes also covenant. As far as we can know, there have never been two private parties or more treaty or covenant, on the contrary, it has never been recorded in two countries represented by each government to make a contract (Ibid: 50). From that event, a legal relationship arose between the two people called the engagement (Subekti, 1998: 1).

The legal relationship in question is a relationship that is regulated and recognized by law and creates legal consequences. In a legal relationship, if one of the parties does not keep their promises voluntarily, then the party who feels disadvantaged can sue the court for the fulfillment of an achievement (Etty Mulyati, 2016: 96).

The terms of Article 1320 of the Civil Code, can be mentioned as follows (Etty Mulyati, 2016: 97-98): Agree that they commit themselves; Skills for making engagements; A certain thing related to the achievement or object of the agreement; A cause or causa that is lawful.

- The principle of consensualism; J. Satrio calls this agreement a formal agreement (J. Satrio, 1996: 50).
- The principle of binding power; The principle of binding power is regulated in Article 1338 paragraph (1) and paragraph (2) of the Civil Code which states that:
 - All agreements made legally apply as laws for those who make them;
 - The agreements are irrevocable other than by agreeing with both parties, or for reasons which are deemed sufficient by law.
- The principle of freedom and contract

Freedom of contract as the ability to enter into an agreement with others. The principle of freedom of contract, according to Indonesian treaty law covers the following scope (Sutan Remy Sjahdeiny, 1993: 47): Freedom to make or not, make an agreement; Freedom to choose the party with whom he wants to make an agreement; Freedom to determine or choose courses from the agreement to be made; Freedom to determine the object of the agreement; Freedom to determine

the form of an agreement; and Freedom to accept or deviate optional legal provisions.

The understanding of the principle of freedom of contract here is not in the sense of absolute freedom because there are various restrictions in freedom, including by law, public order and morality (Subekti, 1996: 13).

Freedom of contract is an essential legal aspect of individual freedom. Kebebasan berkontrak masih dianggap aspek yang esensial dari kebebasan individu, tetapi tidak lagi mempunyai nilai absolut seperti pada abad yang lalu. Akan tetapi, bukan berarti setiap orang dapat sebebas-bebasnya membuat suatu perjanjian, tetap ada batasan-batasan terhadap asas kebebasan berkontrak ini, di antaranya Ronny Sautma Hotma Bako, 1995: 10)

- Own restrictions mentioned in Article 1338 of the Civil Code can be seen from the words "all agreements made legally ..." and for the legal terms of an agreement, again referring to Article 1320 of the Civil Code concerning the legal conditions of the agreement;
- Restrictions based on Article 1332 of the Civil Code where it is stated that only goods that can be traded (have economic value) can become objects of agreement;
- Restrictions based on Article 1338 paragraph (3) of the Civil Code where it is stated that the agreements must be carried out in good faith; and
- Restrictions on the existence of state interference in the contents of an agreement, for example in the field of labor in providing wages for workers, the amount must be in accordance with the provisions concerning the Regional Minimum Wage set by the government.

Based on the principle of freedom of contract, in various societies various kinds of agreements arise known as unnamed agreements. That is, agreements that are not specifically regulated by the Civil Code, for example, the law only regulates lending, but in practice an agreement arises called a credit agreement. Credit agreements are not agreements to borrow and borrow as intended in Book III of the KUH-Perdata (Mariam Darus Badruzaman, 2001: 25).

Theory of Working Law

The basis of the operation of law is society, then the law will be influenced by factors or social forces starting from the stage of manufacture to enactment. Social strength will be an effort to enter in every legislative process effectively and efficiently. Regulations issued are expected in accordance with the wishes, but the effects of these rules depend on social forces such as good legal culture, then the law will work well too, but if the power is reduced or not, then the law will not work. Because society is the basis of the operation of law (S. Maronie, 2018).

In essence the law as a system, so to be able to understand it needs to use a systematic approach. Law as a system, Lawrence M Friedman suggests the existence of components contained in the law. The legal system in Friedman's view consists of three components namely legal structure, legal substance and interacting legal culture (Lawrence M. Friedman, 2009: 17).

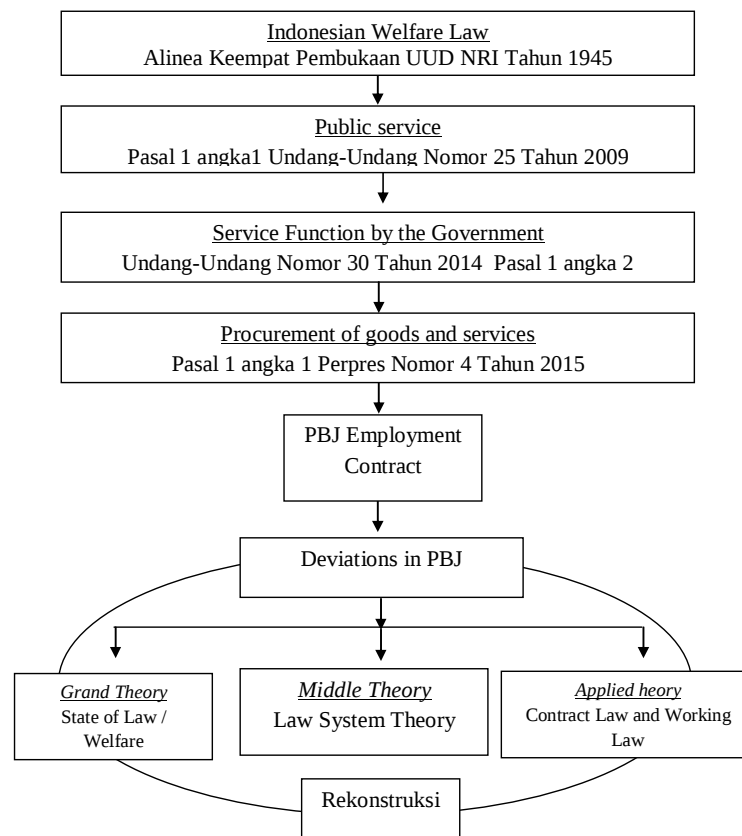


Figure 1: Reconstruction of Government Goods / Services Procurement System Based on Presidential Regulation Number 54 of 2010 jo. Presidential Regulation Number 4 of 2015 Based on Justice Value

CONCLUSIONS

The results of the study that one of the State's goal listed in the opening of the 1945 Constitution is to prosper the nation's life. To realize this, the government must pay attention to public services. Therefore, the government seeks to provide maximum service in fulfilling the procurement of goods / services through work contracts. In overcoming this, supervision is needed to minimize things that are not desirable, so that the objectives of the rule of law can be achieved, namely the welfare of the nation's life in a legal system in the form of contract law and the operation of the law. Then a comprehensive, integrated reconstruction is needed based on social justice for all the people of Indonesia.

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